No.

IN THE

Supreme Court of the United States

JUAN ALMONACID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case thus presents the following important questions:

1. Whether the Seventh Circuit erred in holding that, because there was not overwhelming evidence of guilt, counsel's advice to reject an eight-year plea offer was reasonable, where the precedent of its sister circuits dictates that effective assistance of counsel in the plea bargaining context requires that counsel give a criminal defendant the information necessary to make an informed decision to accept or reject a plea offer — particularly in light of the petitioner's complaint that counsel never informed him of the benefits of accepting the plea offer, including the sentencing exposure at trial, and he rejected said plea offer based on counsel's advice and is currently serving a 235-month sentence.

2. Whether the petitioner was entitled to an evidentiary hearing under 28 U.S.C. § 2255 where he alleges that counsel never informed him of the benefits of accepting the plea offer, including the sentencing risks at trial, and that he would have accepted the plea offer had he been fully advised.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Pre-trial and Trial Proceedings 1

B. Post-conviction Proceedings 2

REASONS FOR GRANTING THE PETITION 5

I. THE SEVENTH CIRCUIT DECISION THAT COUNSEL'S PERFORMANCE WAS REASONABLE BECAUSE HE DID NOT ADVISE PETITIONER TO REJECT THE EIGHT-YEAR PLEA OFFER IN THE FACE OF OVERWHELMING EVIDENCE OF GUILT AND THE ABSENCE OF DEFENSES SHOULD BE REVERSED 6

A. The Seventh Circuit's Holding Conflicts with the Sixth Circuit's Decision in *United States v. Smith* 6

B. The Defendant's Right to Make an Informed Decision Regarding Whether to Reject a Plea Offer Based on the Advice of Counsel Is Widely Recognized 9

C. Under Prevailing Professional Norms, Counsel Is Obligated to Ensure That the Defendant's Decision is Informed 14

II. ALMONACID COMPLAINS THAT HIS DECISION TO REJECT THE PLEA OFFER WAS UNINFORMED 17

III. BECAUSE THE RECORD DOES NOT CONCLUSIVELY SHOW THAT ALMONACID IS ENTITLED TO NO RELIEF, THE SEVENTH CIRCUIT WAS REQUIRED TO REMAND THE CASE FOR AN EVIDENTIARY HEARING 20

CONCLUSION 24

APPENDIX

TABLE OF AUTHORITIES

CASES

Almonacid v. United States,
476 F.3d 518 (7th Cir. 2007).....1, 5

In re Alvernaz,
830 P.2d 747 (Cal. 1992).....19

Blackledge v. Allison,
431 U.S. 63 (1977).....21, 23

Commonwealth v. Copeland,
554 A.2d 54 (Pa. Super. Ct. 1988).....13

Commonwealth v. Napper,
385 A.2d 521 (Pa. Super. Ct. 1978).....13

Cottle v. State,
733 So. 2d 963, 969 (Fla. 1999).....14

Cuthrell v. Director Patuxent Institute,
475 F.2d 1364 (4th Cir. 1973).....17

Davis v. Greiner,
428 F.3d 81 (2d Cir. 2005).....12, 16

Ex parte Wilson,
724 S.W.2d 72 (Tex. Crim. App. 1987).....13

Fontaine v. United States,
411 U.S. 213 (1973).....21

Gallo-Vasquez v. United States,
402 F.3d 793 (7th Cir. 2005).....*passim*

Hanzelka v. State,
682 S.W.2d 385 (Tex. App. 1984).....13

Hill v. Lockhart,
474 U.S. 52 (1985) 9

Jones v. Murray,
947 F.2d 1106 (4th Cir. 1991) 12

Kates v. United States,
930 F. Supp. 189 (E.D. Pa 1996) 16

Leath v. State,
No. E2004-02708-CCA-R3-PC, 2005 WL
3543343 (Tenn. Crim. App. Dec. 28, 2005) 13

Lloyd v. State,
373 S.E.2d 1 (Ga. 1988) 13

Lyles v. State,
382 N.E.2d 991 (Ind. Ct. App. 1978) 13

Machibroda v. United States,
368 U.S. 487 (1962) 21

Martin v. Thomas,
130 Fed. Appx. 121 (9th Cir. 2005) 11

McMann v. Richardson,
397 U.S. 759 (1970) 9

Nunes v. Mueller,
350 F.3d 1045 (9th Cir. 2003) 11

People v. Brown,
723 N.E.2d 362 (Ill. App. Ct. 1999) 14

People v. Curry,
687 N.E.2d 877 (Ill. 1997) 13

People v. Whitfield,
239 N.E.2d 850 (Ill. 1968) 13

Purdy v. United States,
208 F.3d 41 (2d Cir. 2000).....12

Roe v. Flores-Ortega,
528 U.S. 470 (2000).....8

Smith v. United States,
348 F.3d 545 (6th Cir. 2003).....6, 7, 8, 9, 16, 18

State v. Donald,
10 P.3d 1193 (Ariz. 2000).....14

State v. James,
739 P.2d 1161 (Wash. Ct. App. 1987).....14

State v. Ludwig,
369 N.W.2d 722 (Wis. 1985).....13

State v. Simmons,
309 S.E.2d 493 (N.C. Ct. App. 1983).....13

Strickland v. Washington,
466 U.S. 668 (1984).....*passim*

Teague v. Scott,
60 F.3d 1167 (5th Cir. 1995).....10

Tucker v. Holland,
327 S.E.2d 388 (W. Va. 1985).....14

United States v. Almonacid,
70 Fed. Appx. 390 (7th Cir. 2003).....1, 2

United States v. Blaylock,
20 F.3d 1458 (9th Cir. 1994).....17

United States v. Bouthot,
878 F.2d 1506 (1st Cir. 1989).....17

United States v. Booth,
432 F.3d 542 (3d Cir. 2005).....10

United States v. Day,
969 F.2d 39 (3d Cir. 1992).....9, 10

United States v. Gordon,
156 F.3d 376 (2d Cir. 1998).....12

United States v. Grammas,
376 F.3d 433 (5th Cir. 2004).....10

United States v. Herrera,
412 F.3d 577 (5th Cir. 2005).....10

Williams v. State,
605 A.2d 103 (Md. 1992).....14

CONSTITUTIONS

U.S. Const. amend. VI. 1

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 2255.....1, 2, 20, 21, 22

OTHER AUTHORITIES

American Bar Ass'n, *ABA Standards for Criminal Justice: Prosecution and Defense Function*,
Standard 4-5.1 (3d ed. 1993).....15, 18

American Bar Ass'n, *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-5.2(a) (3d ed. 1993) 14

American Bar Ass'n, *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-6.2(a) (3d ed. 1993) 15

Model Code of Professional Responsibility EC 7-7 (1980) 15, 18, 20

Model Rules of Professional Conduct R. 1.4(b) (2007) 15, 19

Petitioner Juan Almonacid respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Almonacid v. United States*, 476 F.3d 518 (7th Cir. 2007) (App. at 1a – 8a). The opinion of the district court denying post–conviction relief (App. at 9a – 17a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

28 U.S.C. § 2255 provides, in relevant part, that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon." *Id.*

STATEMENT OF THE CASE

A Pre–trial and Trial Proceedings

In 1998, Almonacid was indicted under 21 U.S.C. §§ 846 and 841(a)(1) for conspiring to possess with intent to distribute fifty kilograms of cocaine. *United States v. Almonacid*, 70 Fed. Appx. 390, 390 (7th Cir. 2003). Before

trial, the government offered Almonacid a plea deal wherein if he pled guilty to two counts of using a telephone to facilitate a drug-trafficking offense, he would receive a sentence guaranteed not to exceed eight years under the U.S. Sentencing Guidelines (the "Guidelines").[1] (R.1-1 at 40 n.5.) If Almonacid rejected the plea offer and went to trial, he faced a sentence of twenty-four and one-half years. Based on the advice of counsel, Almonacid rejected the plea offer.

On July 18, 2001, the jury returned a guilty verdict against Almonacid for possession with intent to distribute cocaine. *Almonacid*, 70 Fed. Appx. at 390. On April 8, 2002, the district court imposed a sentence of nineteen and one-half years.

Almonacid timely filed in the Seventh Circuit Court of Appeals a notice of appeal challenging his conviction and sentence. *Almonacid*, 70 Fed. Appx. at 390–91. On July 17, 2003, the Seventh Circuit affirmed the judgment of the district court, finding that the government presented sufficient evidence to support both the jury verdict and the sentence imposed. *Almonacid*, 70 Fed. Appx. at 391–93.

B. Post–conviction Proceedings

On July 7, 2004, after exhausting his direct appeal remedies, Almonacid timely filed a *pro se* motion under 28 U.S.C. § 2255, over which the district court had jurisdiction pursuant to 28 U.S.C. § 1331. *See* 28 U.S.C. § 1331 (subject matter jurisdiction). Almonacid complains that his Sixth Amendment right to effective assistance of counsel was violated because his attorney never informed him of the benefits of the government's plea offer, including his sentencing exposure at trial or the risk of conviction based on the testimony of his co–defendants (leading him to believe that he could not be convicted without evidence of confiscated drugs). (*See* R.1-1 at 14; R.3 at 1; R.1-1 at 16.) Almonacid further alleges that counsel told him to reject the

[1] The government stipulated to the existence of the plea offer and its terms.

plea offer because the government "had nothing on [him]." (R.3 at 1.) Never having been informed of the consequences of standing trial, Almonacid alleges that he relied on counsel's opinion and rejected the plea offer. (R.3 at 1.) He requests that the eight-year plea offer be reinstated.

In responding to Almonacid's Motion, the government did not submit an affidavit from counsel or any other evidence to show that Almonacid's allegations were incredible. In fact, the government simply ignored Almonacid's allegations concerning the specific deficiencies of counsel's performance. Rather than address Almonacid's complaints about the content and quality of information he received from counsel, the government argued that counsel's recommendation to reject the plea offer was reasonable because the evidence against him was not "overwhelming" and "there were a variety of viable defenses at trial." (R.1-1 at 46–47.) The government's argument rested on the Seventh Circuit's decision in *Gallo-Vasquez v. United States*, 402 F.3d 793 (7th Cir. 2005), which held that counsel's advice to reject a plea offer does not constitute deficient performance unless there was overwhelming evidence of guilt and an absence of viable defenses. *Id.* Here, the government's argument rested solely on the evidence contained in trial and sentencing transcripts.

Like the government's response, the district court's decision never addressed Almonacid's allegations regarding counsel's failure to inform him of the benefits of accepting the plea offer, including his sentencing exposure at trial. Instead, citing his observations at trial and during the sentencing hearing, the district judge found that there was not overwhelming evidence of Almonacid's guilt and that he had asserted a variety of defenses. Applying *Gallo-Vasquez,* the district court held that counsel's recommendation to reject the plea offer was reasonable. The district court noted that "[c]onsiderable deference is owed to tactical judgment of counsel in these cases" and further held that counsel's opinion was "based on an assessment of the weight of the evidence . . . [and] [i]t is quite impossible on this record and the events of trial to conclude that defense counsel's conduct

[sic] fall outside the ambit of professional competence." (A. 9a – A. 17a.)

On November 21, 2005, Almonacid timely filed a Petition for a Certificate of Appealability. On December 20, 2005, the district court declined to grant the certificate. The Seventh Circuit Court of Appeals granted Almonacid's request for a certificate of appealability on March 6, 2006. The circuit court certified the following issue: whether counsel's advice to reject the government's plea offer constituted deficient performance in violation of Almonacid's Sixth Amendment rights.

On March 29, 2006, the Seventh Circuit appointed present counsel to represent Almonacid in his post–conviction appeal pursuant to the relevant provisions of the Criminal Justice Act.

On appeal, Almonacid argued that counsel's omissions regarding the benefits of accepting the plea offer, including the sentencing risk at trial and the possibility of a conviction based on co-defendant's testimony, deprived him of the right to make an informed decision regarding the plea offer. The government continued to ignore Almonacid's specific allegations regarding counsel's omissions [2] and again invoked *Gallo-Vasquez* claiming that counsel's recommendation to reject the plea offer was reasonable because there was not overwhelming evidence of

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[2] In its response brief, the government asserted — *without citing to the record* — that Almonacid was aware of the sentence he faced if he rejected the plea offer because he was told by the district judge at his initial appearance. However, at oral argument, the government conceded that this allegation was baseless, after Almonacid's counsel informed the court (in response to questioning on this issue) that a review of the tape from Almonacid's initial appearance revealed that, in fact, Almonacid was *not* informed of his sentencing exposure at his initial appearance. (Transcript of Oral Argument held on December 8, 2006, at 8, hereinafter "Tr.".)

Almonacid's guilt and his defenses "abounded." The government also claimed that counsel satisfied his obligations to his client by (i) informing Almonacid of the eight-year plea offer, (ii) making *a* recommendation on what plea to enter, and (iii) allowing Almonacid to make that decision.

On February 14, 2007, the Seventh Circuit issued its decision upholding the ruling of the district court. The Seventh Circuit explained that "[w]hen counsel advises the defendant to reject a plea offer, his performance is not objectively unreasonable unless such advice is made 'in the face of overwhelming evidence of guilt and an absence of viable defenses.'" *Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir. 2007) (quoting *Gallo-Vasquez*, 402 F.3d at 798). Applying this standard, the Seventh Circuit held that counsel did not render deficient performance in advising Almonacid to reject the plea offer because there was not "overwhelming evidence" of his guilt, and he had "viable" defenses. *Almonacid*, 476 F.3d at 522. Like the decision of the district court, the Seventh Circuit's decision did not address Almonacid's allegations regarding counsel's failure to inform Almonacid of the benefits of the government's plea offer, including the sentencing risk of standing trial. Accordingly, no court has considered the impact of counsel's omissions on Almonacid's decision.

REASONS FOR GRANTING THE PETITION

An exercise of this Court's supervisory jurisdiction is warranted because the Seventh Circuit's decision conflicts with standing case law of the Sixth Circuit. The Sixth Circuit holds that counsel's failure to advise his client to accept a plea offer in the face of overwhelming evidence of guilt is not deficient performance. Moreover, the Seventh Circuit's decision departs from the authority of other circuits, including the Third Circuit, Fifth Circuit, and the Ninth Circuit. These other circuits hold that a criminal defendant has the right to make an informed decision on whether to accept or reject a plea offer. Finally, the Seventh Circuit's decision fails to consider counsel's obligations under

prevailing professional norms, as directed by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *See id.* at 688–90.

I. THE SEVENTH CIRCUIT DECISION THAT COUNSEL'S PERFORMANCE WAS REASONABLE BECAUSE HE DID NOT ADVISE PETITIONER TO REJECT THE EIGHT-YEAR PLEA OFFER IN THE FACE OF OVERWHELMING EVIDENCE OF GUILT AND THE ABSENCE OF DEFENSES SHOULD BE REVERSED

A. The Seventh Circuit's Holding Conflicts with the Sixth Circuit's Decision in *United States v. Smith*

The Sixth Circuit holds that a criminal defendant has the right to make an informed decision on whether to accept or reject a plea offer. *Smith v. United States*, 348 F.3d 545 (6th Cir. 2003). In reaching this conclusion, the Sixth Circuit further holds that counsel's advice to reject a plea offer in the face of "overwhelming evidence of guilt" cannot constitute deficient performance because the proper consideration in this context is whether counsel provided his client with the information the client needed to make an informed decision. *Id.* at 552–54. The legal standard adopted by the Seventh Circuit in *Gallo-Vasquez* and applied in this case squarely conflicts with the Sixth Circuit's holding in *Smith*, and rests on the erroneous premise that counsel's advice to reject a plea offer is solely a matter of strategy.

In *Smith* the petitioner filed a motion pursuant to 28 U.S.C. § 2255 alleging that his Sixth Amendment right to effective assistance of counsel was violated during plea bargaining. Specifically, the petitioner alleged that his attorney's performance was constitutionally deficient because counsel did not insist that he accept a 20-month plea offer even though there was "overwhelming evidence of guilt." *See id.* at 548–49, 552. The petitioner was convicted at trial and

sentenced to 262 months imprisonment. *See id.* The government argued that the petitioner could not establish deficient performance by counsel because, by his own admission, he was aware that the government had made a 20-month plea offer. *Id.* at 549. Further, the government submitted an affidavit from counsel swearing that the petitioner was aware of the government's plea offer and that he "discussed" the offer with his client. *Id.* at 549–50. The district court rejected the petitioner's claim; the court found that the petitioner failed to establish prejudice and reasoned that, because the petitioner was aware of the plea offer and went to trial protesting his innocence, "it was unlikely that [the petitioner] would have pleaded guilty even if he had received proper advice from his attorney." *Id.* at 550.

On appeal, the Sixth Circuit explained that, because the "decision to plead guilty — first, last, and always — rests with the defendant, not his lawyer," the issue, as presented by petitioner, was an improper "basis upon which to find deficient performance by defense counsel." *Id.* at 552. The court acknowledged that counsel "*may* provide an opinion on the strength of the government's case . . . and the wisdom of a chosen course of action" when counseling her client regarding a plea offer made by the government, but explained that the relevant consideration in this context for purposes of evaluating counsel's performance is whether counsel "*fully* inform[ed] her client of the available options." *Id.* (emphasis added). The court further defined counsel's obligations to his client:

> [I]n the context of the modern criminal justice system, which is driven largely by the Sentencing Guidelines . . . [a] criminal defendant has the right to expect *at least* that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the *sentencing exposure* the defendant will face as a consequence of exercising each of the options available.

Id. at 552–53 (emphasis added). The Sixth Circuit further held that "[t]he criminal defendant has a right to this information, just as he is entitled to the benefit of his attorney's superior experience and training in the criminal law." *Id.* at 553.

Based on the evidence submitted in *Smith*, the Sixth Circuit concluded that "the record in this case leaves . . . considerable doubt over the nature and quality of the advice [the defendant] received before he made his final decision to reject the government's proposed plea bargain." *Id.* Specifically, the court noted that counsel's affidavit never stated that he had informed his client "of the dramatically higher sentence potential (over ten times as much incarceration) to which Smith was exposed if he were convicted of even one of [the] many charges." *Id.* Significantly, the court declined the government's invitation to find that the petitioner made an informed decision to reject the plea offer because the petitioner was aware that he faced a "'steep sentence'" at trial, finding that there was "no other evidence that [the defendant's] sentencing exposure . . . was ever conveyed to [the defendant] *before* trial." *Id.* (emphasis added). Because there was nothing in the record that allowed the court to determine conclusively that the petitioner knew his sentencing exposure before he made the decision to reject the plea offer, the Sixth Circuit remanded the case for an evidentiary hearing. *Id.* at 553–54.

The Sixth Circuit's decision in *Smith* emphasizes the clear distinction between counsel's obligation to inform a defendant of the considerations that are material to making an informed decision on whether to accept or reject a plea offer and counsel's opinion as to whether — as a matter of strategy — he thinks his client should accept the plea offer or go to trial. The foundation for this distinction stems from this Court's Sixth Amendment jurisprudence. Indeed, this Court has recognized that the decision whether to plead guilty or contest a criminal charge — ordinarily the single most important decision in any criminal case — must be made by the defendant, not counsel. *See, e.g., Roe v. Flores-*

Ortega, 528 U.S. 470, 484–87 (2000) (implying that the decision of whether to plead accept or reject a plea rests with the defendant); *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). And, that a defendant has a right to effective assistance of counsel in making that decision. *See McMann v. Richardson*, 397 U.S. 759, 771 & n.14 (1970); *Hill*, 474 U.S. at 57 (quoting *McMann*, 397 U.S. at 771 & n.14) ("Our concern . . . with the quality of counsel's performance in advising a defendant whether to plead guilty stem[s] from the more general principle that all 'defendants facing felony charges are entitled to the effective assistance of competent counsel.'"). Finally, in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984), the Sixth Circuit evaluates the reasonableness of counsel's performance by the standards of prevailing professional norms. *See Strickland*, 466 U.S. at 690; *Smith*, 348 F.3d at 552–54.

B. The Defendant's Right to Make an Informed Decision Regarding Whether to Reject a Plea Offer Based on the Advice of Counsel Is Widely Recognized

The Sixth Circuit's holding that a defendant has a right to an informed decision on whether to accept or reject a plea offer is widely supported by our nation's federal jurisprudence. In *United States v. Day*, 969 F.2d 39 (3d Cir. 1992), the Third Circuit held that "a defendant has the right to make a reasonably informed decision whether to accept a plea offer." *Id.* at 43 (citing *Hill*, 474 U.S. at 56–57 (finding that voluntariness of guilty plea depends on adequacy of counsel's advice)); *Id.* at 40 (finding that petitioner stated a claim for ineffective assistance of counsel where he alleged that he rejected plea bargain of five years on advice of

counsel, and was sentenced to 22 years after trial). Further, the court held that "[k]nowledge of the *comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty*." *Id.* at 43 (emphasis added). The Third Circuit recently emphasized the importance of the defendant's right to make an informed decision on whether to accept or reject a plea offer in *United States v. Booth*, 432 F.3d 542, 549–50 (3d Cir. 2005). In *Booth* the court held that if a defendant raised sufficient allegations suggesting that his counsel's advice in helping to make the decision was "'so insufficient that it undermined [the defendant's] ability to make an intelligent decision about whether to accept the [plea] offer,'" the defendant was entitled to an evidentiary hearing on the merits of his habeas petition. *Id.* (citing *Day*, 969 F.2d at 43–44).

Similarly, the Fifth Circuit unequivocally found that a failure to advise a defendant of the maximum sentence imposable at trial violated *Strickland's* objective standard of reasonableness. *See United States v. Grammas*, 376 F.3d 433, 436–37 (5th Cir. 2004); *see also Teague v. Scott*, 60 F.3d 1167, 1171–72 (5th Cir. 1995) (habeas petition for ineffective assistance remanded for hearing on prejudice where counsel misrepresented sentencing exposure). In *United States v. Herrera*, the court noted that one of the most important duties for an attorney representing a criminal defendant is to advise him about accepting a guilty plea. 412 F.3d 577, 581–82 (5th Cir. 2005) (finding misrepresentation of sentencing exposure deficient performance and remanding case for evidentiary hearing regarding defendant's reliance on his trial attorney's statements). An attorney discharges this obligation, the court noted, "by informing the defendant about the relevant circumstances and the likely consequences of a plea," of which his sentencing exposure is a necessary part. *Id.* Without this full understanding, the "defendant cannot make an intelligent choice." *Id.*

This right to make an informed decision also is recognized by the Ninth Circuit. *See Nunes v. Mueller*, 350 F.3d 1045, 1052–53 (9th Cir. 2003); *see also Martin v. Thomas*, 130 Fed. Appx. 121, 123 (9th Cir. 2005) (unpublished opinion) ("Martin had the right to make an informed decision on whether to plead guilty or go to trial."). In *Nunes*, the defendant filed a motion pursuant to 28 U.S.C. § 2254 alleging that his Sixth Amendment right to effective assistance of counsel was violated because his counsel misrepresented his sentencing exposure in advising him of a plea offer. *See Nunes*, 350 F.3d at 1049–50. There, the prosecution argued that Nunes suffered no prejudice because he received a fair trial. *See id.* at 1052. The Ninth Circuit disagreed with the prosecution and explained "the right that Nunes [argued] he lost was not the right to a plea bargain as such, but rather the right to counsel's assistance in making an informed decision once a plea had been put on the table." *Id.* The court reasoned:

> During all critical stages of a prosecution, which must include the plea bargaining process, it is counsel's "duty to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution" (*Strickland*, 466 U.S. at 688). Those obligations ensure that the ultimate authority remains with the defendant "to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." (*Jones v. Barnes*, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983)). Here the right that Nunes claims he lost was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law.

Nunes, 350 F.3d at 1053.

The Second and Fourth Circuits hold that prevailing professional norms dictate that counsel is obligated to provide his client with the information he needs to make an informed decision, and failure so inform one's client constitutes deficient performance under *Strickland*. In *Purdy v. United States*, 208 F.3d 41 (2d Cir. 2000), the Second Circuit found that the Model Rules of Professional Conduct required counsel to communicate to the defendant the terms of the plea agreement offered by the government, and counsel "should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed." *Purdy*, 208 F.3d at 44–45; *see also United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) ("'[K]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty.'") (citation omitted). Similarly, in *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991), the Fourth Circuit turned to the ABA Standards for Criminal Justice in its analysis of a claim for ineffective assistance of counsel in the context of considering a plea agreement. *See Jones*, 947 F.2d at 1110–11. Quoting Standard 14–3.2, the court held that "'[t]o aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the client of the alternatives available and of considerations deemed important by defense counsel or the defendant in reaching a decision.'" *Jones*, 947 F.2d at 1110 (citation omitted). These alternatives necessarily included the defendant's sentencing exposure at trial. *Id.* at 1110–11.

In this vein, the Second Circuit recently emphasized that counsel has an obligation to "adequately inform her client about the considerations that are relevant to her client's decision to accept or deny a plea bargain." *Davis v. Greiner*, 428 F.3d 81, 88 (2d Cir. 2005). The Second Circuit reasoned that failing to inform a defendant of a crucial aspect of the plea offer is a breach of counsel's duty to "'explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding representation.'" *Id.* at 89 (quoting Model Rules of Prof'l Conduct R. 1.4(b)).

The Sixth Circuit's holding that a defendant has a right to an informed decision on whether to accept or reject a plea offer also is widely supported by the jurisprudence of our States. *See, e.g., Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super. Ct. 1978) (counsel ineffective in giving no advice about desirability of plea offer with three-year maximum sentence when trial risked ten to forty years); *Lloyd v. State*, 373 S.E.2d 1, 3 (Ga. 1988) (citing ABA standard finding that "[o]bjective professional standards dictate that a defendant . . . be *advised of the consequences of the choices confronting him*" when deciding whether to accept or reject a plea offer and "[f]or counsel to do otherwise amounts to less than reasonably professional assistance" (emphasis added)); *People v. Whitfield*, 239 N.E.2d 850, 852 (Ill. 1968) (finding the decision whether to accept or reject a plea offer goes "beyond trial strategy" and therefore such decision rests with the defendant not his counsel or mother); *Lyles v. State*, 382 N.E.2d 991, 993–94 (Ind. Ct. App. 1978) ("'Because plea discussions are usually held without the accused being present, there is a duty on the lawyer to communicate *fully* to his client the substance of the discussions. . . . If the accused's choice on the question of a guilty plea is to be an informed one, he must act with *full awareness* . . . .'" (quoting commentary to ABA Standards, The Defense Functions § 6.2(a)) (emphasis added)); *State v. Simmons*, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983) (same); *Hanzelka v. State*, 682 S.W.2d 385, 387 (Tex. App. 1984) (same); *Ex parte Wilson*, 724 S.W.2d 72, 74 (Tex. Crim. App. 1987) (same); *Commonwealth v. Copeland*, 554 A.2d 54, 60 (Pa. Super. Ct. 1988) (stating "[d]efense counsel has a duty to communicate to his client, not only the terms of a plea bargain offer, but also the relative merits of the offer compared to the defendant's chances at trial"); *State v. Ludwig*, 369 N.W.2d 722, 727 (Wis. 1985) (stating "simple disclosure of the terms of [plea] offer to the Defendant is of little value"); *Leath v. State*, No. E2004–02708-CCA-R3-PC, 2005 WL 3543343, at *8–9 (Tenn. Crim. App. Dec. 28, 2005) (explaining a trial counsel's failure to inform a petitioner of the potential maximum sentencing exposure in the plea offer context is grounds for ineffective assistance); *People v. Curry*, 687 N.E.2d 877, 887 (Ill. 1997) (stating that a

"criminal defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer" including sentencing information (emphasis omitted)); *State v. James*, 739 P.2d 1161, 1167 (Wash. Ct. App. 1987) (finding that, to effectively assist client, counsel must aid client in making an informed decision to accept or reject plea offer by discussing with client the strengths and weaknesses of client's case); *Tucker v. Holland*, 327 S.E.2d 388, 394 (W. Va. 1985) (stating counsel's advice must be accurate to enable client to make an informed choice whether to accept plea); *People v. Brown*, 723 N.E.2d 362, 366 (Ill. App. Ct. 1999) (finding "counsel did not fulfill his duty to accurately inform defendant of the direct consequences likely to stem from acceptance or rejection of the [plea]"); *State v. Donald*, 10 P.3d 1193, 1201 (Ariz. 2000) (concluding that failure to explain sentencing aspects of plea offer was deficient advice); *Cottle v. State*, 733 So. 2d 963, 969 (Fla. 1999) (stating "an inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea"); *Williams v. State*, 605 A.2d 103, 108 (Md. 1992) (explaining that a trial attorney "who . . . provides the defendant with incomplete or misleading information with regard to the [plea] offer" performs deficiently).

C. Under Prevailing Professional Norms, Counsel Is Obligated to Ensure that the Defendant's Decision Is Informed

Although this Court has declined to "exhaustively define the obligations of counsel," it has stated that the relevant inquiry must be whether counsel's assistance was reasonable under prevailing professional norms and considering the surrounding circumstances. *Strickland*, 466 U.S. at 688. Prevailing professional norms make clear that counsel has a duty to ensure that his client's decision on whether to accept a plea offer or go to trial is informed. The American Bar Association Standards for Criminal Justice state that "[t]he decisions which are to be made by the accused after *full* consultation with counsel include: . . . whether to accept a plea agreement . . . ." American Bar Ass'n, *ABA Standards*

for Criminal Justice: Prosecution and Defense Function, Standard 4-5.2(a), at 199–200 (3d ed. 1993) [hereinafter, "*ABA Standards for Criminal Justice*"] (emphasis added). This principle is paralleled in the Model Code of Professional Responsibility (the "Model Code"), which provides that "[a] defense lawyer in a criminal case has the duty to advise his client *fully* on whether a particular plea to a charge appears to be desirable . . . but it is for the client to decide what plea should be entered . . . ." *See* Model Code of Prof'l Responsibility EC 7–7 (1980) (emphasis added). For the avoidance of any doubt, the Model Code expressly states that counsel has a duty to "explain a matter to the extent reasonably necessary to permit a *client to make informed decisions* regarding representation." Model Rules of Prof'l Conduct R. 1.4(b) (2007) (emphasis added).

Any ambiguities regarding the type of information that a defendant needs to make an informed decision on whether to accept or reject a plea offer also are clarified by prevailing professional norms. These standards indicate that, at a minimum, counsel should inform the defendant of the terms of the plea offer, and the consequences of rejecting it, including the maximum and minimum sentences which may be imposed in the event of a conviction. *See ABA Standards for Criminal Justice*, *supra*, Standard 4–5.1 cmt., at 198 ("The matters on which [a] defendant needs advice before entering a plea go beyond appraisal of the likelihood of conviction or acquittal. Counsel should inform the defendant of the maximum and minimum sentences that can be imposed . . . ."). The importance of the defendant's knowledge of the consequences of the alternatives available to him, *i.e.*, accepting the plea offer or standing trial, cannot be overstated: "If the [defendant's] choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor." *See ABA Standards for Criminal Justice*, Standard 4–6.2(a) cmt.

These professional norms underscore the distinction between the defendant's *decision* to accept or reject a plea offer and counsel's *opinion* as to whether the defendant

should accept or reject the plea offer, and they make clear that the reasonableness of counsel's performance is measured by whether the defendant's *decision* was an informed one. Indeed, nothing in these standards can be read to suggest that, so long as counsel provides an opinion on the matter which later proves to be reasonable, counsel need not satisfy the other duties he owes his client. In other words, counsel's *opinion* on whether his client should go to trial is not a substitute for giving his client the information necessary to make an informed judgment on whether the benefits of the plea offer outweigh the risks of going to trial. *See Smith*, 348 F.3d at 552 ("Although the attorney may provide an opinion on the strength of the government's case . . . the ultimate decision of whether to go to trial must be made by the person who will bear the ultimate consequence of a conviction."). The reason for this is obvious: While counsel himself might view the chance of acquittal and serving no time outweighs the benefit of a lower certain sentence under the plea offer, his client might view the guaranteed lower sentence under the plea offer as a benefit that outweighs the risk, however slight, of receiving the maximum possible sentence if convicted at trial. Nevertheless, counsel's *opinion* might properly be viewed as strategy or tactical decisions that are not to be judged with the benefit of hindsight; however, there is no strategy or judgment involved in counsel breaching his professional obligations by failing to give his client the information the client needs to assess the matter for himself. *See Davis*, 423 F.3d at 90 (finding that there could be "no appropriate strategic reason for failing to inform his client of the risk of proffering"); *see also Kates v. United States*, 930 F. Supp. 189, 192 (E.D. Pa 1996) (finding ineffective assistance of counsel where counsel failed to inform client of sentencing exposure if client rejected plea offer).

II. ALMONACID COMPLAINS THAT HIS DECISION TO REJECT THE PLEA OFFER WAS UNINFORMED

The crux of Almonacid's complaint is that counsel failed to give him the information necessary to make an informed decision on whether to accept the eight-year plea offer or go to trial. Indeed, the allegations in Almonacid's motion and accompanying documents are directed at the complete lack of information from counsel concerning the benefits of pleading guilty and risks of going to trial. It is these omissions — rather than affirmative misrepresentations by counsel — that deprived Almonacid of his right to make an informed decision. [3] Without this vital bottom-line information, Almonacid's decision was based on counsel's *opinion* that he should reject the plea offer because the government had "nothing on [him]."

Under the established precedent of the Third, Fifth, Sixth and Ninth circuits, Almonacid's allegations, if proven, establish a clear violation of his right to make an informed decision on whether to accept or reject the government's eight-year plea offer. Counsel's performance — informing

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[3] That counsel omitted Almonacid's sentencing exposure when he recommended that Almonacid stand trial rather than making an explicit misrepresentation when advising him to reject the plea offer is a distinction without a difference. In addition to the clear obligation to disclose this information, *supra*, it is well understood that an *omission* of material information is tantamount to a misrepresentation. *See United States v. Bouthot*, 878 F.2d 1506, 1511 (1st Cir. 1989); *cf. United States v. Blaylock*, 20 F.3d 1458, 1465–66 (9th Cir. 1994) ("If an attorney's incompetent advice regarding a plea bargain falls below reasonable standards of professional conduct, *a fortiori,* failure even to inform defendant of the plea offer does so as well."); *Cuthrell v. Director Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973) (holding that counsel *must* inform a defendant of the direct consequence of a conviction and explaining that a direct consequence is a consequence that represents "a definite, immediate, and largely automatic effect on the range of a defendant's punishment").

Almonacid of the terms of the plea offer and recommending that Almonacid reject it on the conclusory statement that the government "had nothing on [him] — plainly omitted critical information regarding risks of standing trial from Almonacid's consideration. As the Sixth Circuit explained in *Smith*, Almonacid had the right to expect, at least, that counsel would "review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure that [he faced] as a consequence of exercising each of the options available to him." *Smith*, 348 F.3d at 553.

That Almonacid had the right to make an informed decision is founds in prevailing professional norms. As previously discussed, these standards dictate that counsel had an obligation to advise Almonacid *fully* about the benefits of the eight-year plea offer. *See* Model Code of Prof'l Responsibility EC 7–7 (1980) ("A defense lawyer in a criminal case has the duty to advise his client *fully* on whether a particular plea to a charge appears to be desirable . . . but it is for the client to decide what plea should be entered . . . .") (emphasis added). This means that counsel was required to inform Almonacid that the consequences of rejecting the plea offer included a maximum sentence that exceeded twenty-four years, and the possibility that the government could sustain a conviction on co–defendant testimony. *See ABA Standards for Criminal Justice*, *supra*, Standard 4–5.1 cmt., at 198. Counsel's opinion, in the absence of information explaining the potential downside of his recommended course of action, constituted a breach of his professional obligations. Importantly, counsel had no basis for *assuming* that Almonacid otherwise understood the sentencing benefits of accepting the plea offer, particularly since Almonacid speaks little English and had no previous experience with the criminal justice system. Regardless of whether counsel's *opinion* to reject the plea offer, in hindsight, was a reasonable strategy, this strategy does not justify counsel omitting such critical information from his advice before

trial.[4] *See Strickland*, 466 U.S. at 690–91. Counsel's performance was unreasonable "under prevailing professional norms," and his deficient performance caused Almonacid to reject a plea offer that was less than half of the sentence that he is currently serving. *Id.* at 688.

Here, the implicit holding of the Seventh Circuit's decision is that Almonacid did not have a right to make an informed decision on whether to accept or reject the plea offer, and this conflicts with the jurisprudence of the circuit's sister courts and that of many states. Moreover, the standard against which the Seventh Circuit evaluates the performance of counsel in this context, as reflected in *Gallo-Vasquez*, falls well below the objective standards of reasonableness established prevailing professional norms, and adopted by its sister circuits. In focusing on whether counsel's recommendation to reject the plea offer was reasonable in light of the evidence presented at trial, the Seventh Circuit implicitly endorsed counsel's breach of his duties to "explain a matter to the extent reasonably necessary to permit [Almonacid] to make informed decisions regarding the representation," Model Rules of Prof'l Conduct R. 1.4(b) (2007), and "advise [Almonacid] fully on whether [the eight-

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[4] That Almonacid rejected the plea offer, rather than entering a guilty plea, does not change the standard by which counsel's performance is to be judged. Indeed, counsel's obligation in this context is to assist his client in the decision-making process:

> Both alternate decisions — to plead guilty or instead to proceed to trial — are products of the same attorney-client interaction and involve the same professional obligations of counsel. Application of the constitutional guarantee of effective assistance of counsel to the advice given a defendant to plead guilty necessarily encompasses the counterpart of that advice: to reject a proffered plea bargain and submit the issue of guilt to the trier of fact.

In re Alvernaz, 830 P.2d 747, 753–54 (Cal. 1992).

year plea offer was] desirable." Model Code of Prof'l Responsibility EC 7-7 (1980).

Notwithstanding that Almonacid's allegations concerned a specific instance of misconduct that occurred *outside* the record, the Seventh Circuit assumed the role of Monday morning quarterback in finding that counsel's recommendation to reject the plea was reasonable because there was not "overwhelming" evidence of Almonacid's guilt at trial. Because the Seventh Circuit's decision conflicts with the Sixth Circuit's decision in *Smith*, and the standard for deficient performance established therein sanctions conduct by both counsel and the courts departing from this Court's jurisprudence, this Court should grant certiorari to resolve these conflicts.

III. BECAUSE THE RECORD DOES NOT CONCLUSIVELY SHOW THAT ALMONACID IS ENTITLED TO NO RELIEF, THE SEVENTH CIRCUIT WAS REQUIRED TO REMAND THE CASE FOR AN EVIDENTIARY HEARING

The Seventh Circuit further held that, based on the "evidence" submitted by Almonacid and on the district court's observations from prior proceedings, "it cannot be said that the court erred" when it summarily dismissed Almonacid's claim. The Seventh Circuit's standard for granting an evidentiary hearing — requiring a petitioner to proffer *evidence* showing that he is entitled to relief — ignores the standard established by Congress in 28 U.S.C. § 2255 and conflicts with the long-standing precedent of this Court.

District Courts are required to "grant a prompt hearing" when [a Section 2255] motion is filed "*unless* the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 (emphasis added). This Court holds that district courts must strictly construe 28 U.S.C. § 2255 and has remanded Section 2255 motions for evidentiary hearings where the petitioner's

allegations related to events or circumstances outside the record or the presence of the district judge issues or where the issues raised by the motion could not be conclusively determined either by the motion itself or by the files and records in the trial court. *See, e.g.*, *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (remanding for evidentiary hearing Section 2255 motion alleging guilty plea was not knowing and voluntary because it was induced by the prosecutor's promises regarding the length of the sentence defendant would receive); *Fontaine v. United States*, 411 U.S. 213, 214–15 (1973) (remanding for evidentiary hearing Section 2255 motion alleging that plea was not voluntary because it was induced by a combination of fear, coercive police tactics, and illness); *see also Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (holding that only "conclusory *allegations*" or "*contentions* that in the face of the record are wholly incredible" are subject to summary dismissal) (emphasis added).

Moreover, this Court flatly rejected the notion that the statute requires a movant submit evidentiary support when filing his motion. *See, e.g.*, *Machibroda*, 368 U.S. at 495 (holding that the petitioner's allegations warranted a hearing to afford the petitioner an "opportunity to support [the allegations] by evidence . . ."); *Blackledge*, 431 U.S. at 74; *Fontaine*, 411 U.S. at 215. Indeed, this Court has explained that whether a petitioner under Section 2255 has carried his burden of proof must be determined "[n]ot by the pleadings and the affidavits, but by the whole of the testimony." *Machibroda*, 368 U.S. at 495 (citations omitted).

Almonacid's allegations here are not so vague or conclusory as to warrant dismissal on that basis alone.[5] The allegations set forth in Almonacid's motion and supporting documents completely satisfy Rule 2 of the Federal Rules Governing Section 2255 Proceedings and 28 U.S.C. § 2255 and require an evidentiary hearing under this Court's precedent. Specifically, Almonacid alleges as his grounds

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[5] Indeed, neither the district court nor the Seventh Circuit cited this as the basis for dismissing Almonacid's petition without an evidentiary hearing.

for relief that "counsel failed to properly advise me regarding the Government [sic] proffer of [sic] 8-year sentence for guilty plea." (R.1-1 at 4.) But he did not stop there. He proceeded to elaborate upon this claim with additional allegations in his affidavit, which indicated that he "did not understand the mechanics of the federal criminal justice system" and that he "deferred to [] counsel to . . . inform [him] adequately," but that counsel did not inform him about the significance of "codefendant's testimony." (R.3 at 1.) Further, Almonacid explained that counsel did not "explain that the guilty plea coupled with a cooperation agreement . . . would surely result in a significantly lower sentence than 235 months" (R.1-1 at 4.); that counsel led him to "believe that he could not be found guilty without any actual drugs being confiscated" (R.1-1 at 16.); and that counsel never advised him of the "benefits of the proffered eight-year sentence from the government."[6] Finally, Almonacid stated in no uncertain terms: "[H]ad I been properly advised I would have accepted the Government's offer of eight-year and entered a guilty plea." (R.3 at 1.)

These allegations, when viewed against the record, were not so "palpably incredible" or so "patently frivolous or false" as to warrant dismissal without an evidentiary hearing. (*Id.* (quoting *Herman v. Claudy*, 350 U.S. 116, 119 (1963))). Indeed, neither the district court nor the Seventh Circuit could have reasonably determined that counsel's performance during trial defeated Almonacid's claims because his allegations plainly relate to communications between him and counsel *before* trial; those communications indisputably did not take place on the record or elsewhere before the district judge. Significantly, the government never challenged the veracity of Almonacid's allegations, nor did the government submit any evidence, such as an affidavit from counsel or copies of correspondence between counsel and client, to prove conclusively that he was entitled

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[6] That Almonacid also alleges that counsel's assessment of the evidence against him was unrealistic, *i.e.*, "they have nothing on [you]," does not diminish his clear complaint that counsel did not explain or inform him of the benefits of the plea offers, including the sentencing risks of going to trial. (R.1-1 at 4; R.3 at 1.)

to no relief. *Cf. Gallo-Vasquez*, 402 F.3d at 798 (considering letter from counsel to the defendant which disproved the allegations in defendant's motion). What is more, the government concedes that its assertion that the district judge informed Almonacid that he faced almost twenty-five years at his initial appearance hearing was pure conjecture — it had no way of showing that Almonacid had been told his sentencing exposure by the court during this proceeding. (Tr. at 20–21.) Because nothing in the record discredits Almonacid's allegation that, had he known that he could have received the 235–month sentence imposed (which is five years less than his maximum exposure) he would have accepted the eight-year plea offer, he was entitled to an evidentiary hearing under the clearly established precedent of this Court and the plain language of 28 U.S.C. § 2255.

For the foregoing reasons, the Seventh Circuit's decision must be vacated and the case remanded to the district court for an evidentiary hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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